

In the United States
Circuit Court of Appeals
For the Ninth Circuit

TOM RUSTAD, Owner and Claimant of the
Oil Screw "MELODY" and FIDELITY &
DEPOSIT COMPANY OF MARYLAND, a
corporation,

Appellants,

vs.

CHARLES WUORI, JOHN KURTTI, CYRUS
C. CHRISTENSEN and ARMAND SYVA-
NEN,

Appellees.

BRIEF ON BEHALF OF APPELLEES

Upon Appeal from the District Court of the United
States for the District of Oregon.

WOOD, MATTHIESSEN & WOOD,
ERSKINE WOOD,
LOFTON L. TATUM,
Yeon Bldg., Portland 4, Oregon,
Proctors for Appellants.

JAY BOWERMAN,
Yeon Bldg., Portland 4, Oregon,
A. C. FULTON,
Astoria, Oregon,
Proctors for Appellees.

FILED

SEP 10 1946

PAUL P. O'BRIEN, Jr.

INDEX

	Page
Argument	12
Points and Authorities No. I	12
Points and Authorities No. II	13
Points and Authorities No. III	17
Points and Authorities No. IV	18
Points and Authorities No. V	27
Points and Authorities No. VI and VII	28
Points and Authorities No. VIII	30
Points and Authorities No. IX, X and XI	31
Points and Authorities	2
Statement of Facts	7

TABLE OF CASES

	Page
Central Wharf Towboat Co., et al, v. United States, (The Anahuag), 295 Fed. 246	3, 18
Rules, Circuit Court of Appeals, Sec. 73, subd. (b) 13	
Ship Blackwall, The, 19 L. ed., pp. 870-875; 10 Wall 1.	3, 5, 18, 19, 31
United States v. Central Wharf Towboat Co., 3 Fed. (2d), 250	3, 18
Vol. 47, Am. Jur., Salvage, Sec. 4	4
Vol. 47, Am. Jur., Salvage, Sec. 5	5
Vol. 47, Am. Jur., Salvage, Sec. 6	3, 18
Vol. 47, Am. Jur., Salvage, Sec. 26	3, 4, 18
Vol. 47, Am. Jur., Salvage, Sec. 31	5, 31
Vol. 47, Am. Jur., Salvage, Sec. 32	6, 31
Vol. 47, Am. Jur., Salvage, Sec. 33	3, 18
Vol. 47, Am. Jur., Salvage, Sec. 36	5, 30
Vol. 47, Am. Jur., Salvage, Sec. 38	7, 32
Vol. 47, Am. Jur., Salvage, Sec. 46	2, 14

In the United States
Circuit Court of Appeals
For the Ninth Circuit

TOM RUSTAD, Owner and Claimant of the
Oil Screw "MELODY" and FIDELITY &
DEPOSIT COMPANY OF MARYLAND, a
corporation,

Appellants,

vs.

CHARLES WUORI, JOHN KURTTI, CYRUS
C. CHRISTENSEN and ARMAND SYVA-
NEN,

Appellees.

BRIEF ON BEHALF OF APPELLEES

Upon Appeal from the District Court of the United
States for the District of Oregon.

The proceedings herein are a libel in admiralty brought in the District Court of Oregon. It is the contention of the appellees that this court is without jurisdiction to review this matter on appeal for the reason that appellants did not comply with subdivision (b) of Rule 73 of the Rules of Civil Procedure.

POINTS AND AUTHORITIES

I.

MOTION TO DISMISS APPEAL

Rule 73, of the Rules of Civil Procedure, subdivision (b), reads in part as follows:

The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and **shall name the court to which the appeal is taken.**

II.

FRIVOLOUS APPEAL

An appellate court in reviewing the amount of a salvage award, the fixing of which involves the exercise of discretion by the lower court, is always reluctant to make any alteration thereof; it will not interfere with the decision of the court below as to the amount of salvage awarded unless the judgment has proceeded upon an erroneous principle or a misapprehension of the facts, or is grossly or manifestly excessive or inadequate. The fact that the appellate court might have allowed a greater or less sum if the question had first been presented to that court is no ground for increasing or reducing the award. In accordance with these principles, the award fixed upon by the lower court will not be increased on the ground that it is inadequate. The same rule is applicable in diminishing the amount fixed upon by the lower court, and the amount so fixed will not ordinarily be diminished unless it can be said to be excessive as a matter of law.

47 A. Jur., Salvage, Sec. 46, pg. 289.

III.

GOVERNMENT ASSISTANCE

Where a government vessel and others co-operate

in a salvage service, the proper method of making an award to the latter is to fix the value of the entire service and deduct the share earned by the government ship.

Central Wharf Towboat Co., et al. v. United States, (The Anahuag), 295 Fed. 246.

United States v. Central Wharf Towboat Co., 3 Fed. (2d), 250.

47 Am. Jur., Salvage, Sec. 26, pg. 277.

IV.

RULES OF SALVAGE AWARD

Courts of admiralty usually consider the following circumstances as the main ingredients in determining the amount of the reward to be decreed for a salvage service: (1) The labor expended by the salvors in rendering the salvage service. (2) The promptitude, skill and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4) The risk incurred by the salvors in securing the property from the impending peril. (5) The value of the property saved. (6) The degree of danger from which the property was rescued.

The Ship Blackwall, her tackle, etc., James Creary, Claimant, vs. The Sancelito Water and Steam Tug Company and George Clark, 19 L. ed., pp. 870-875.

47 Am. Jur., Salvage, Sec. 33, pg. 281.

47 Am. Jur., Salvage, Sec. 6, pg. 265.

V.

EFFECT OF ASSISTANCE

If part of a salvage service is performed by one set of salvors, and the salvage is afterward completed by others, the first set is entitled to a reward pro tanto for the services they actually rendered even though the part they took, standing by itself, would not in fact have effected the salvage.

47 Am. Jur., Salvage, Sec. 26, pg. 277.

VI.

DERELICT

Derelict vessels and other property constitute subjects of salvage. A vessel or cargo is derelict within the rules of the maritime law relating to salvage when it is abandoned without hope of recovery and without intention of returning to it. It is immaterial whether the abandonment arises from accident, necessity, or voluntary dereliction.

47 Am. Jur., Salvage, Sec. 4, pg. 263.

VII.

QUASI DERELICT

In salvage proceedings where the circumstances do not constitute the vessel in question a derelict, but are of such a nature as to render the services performed in saving it highly meritorious, the courts have sometimes applied the term "quasi derelict" to the

vessel. Thus, the term has been applied to a vessel in a desperate condition, where the persons on board were incapable, by reason of their mental and physical condition, of doing anything for their own safety. So, also, it has been held applicable to a vessel left by its master and crew when thought to be sinking, where the master had gone immediately for assistance, and the vessel was finally brought to port.

47 Am. Jur., Salvage, Sec. 5, pg. 264.

VIII.

INJURY TO SALVING VESSEL

It is settled that a salvage award should include damages suffered by the salving vessel due to the necessities of the service.

47 Am. Jur., Salvage, Sec. 36, pg. 283.

IX.

THE AWARD FOR SALVAGE SERVICES

Salvage is not viewed by the admiralty courts merely as pay on the principle of a quantum meruit, but as a reward given for perilous services voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property.

The Blackwall v. Sancelito Water & Steam Tug Co., (The Blackwall), 10 Wall 1, 19 L. ed. 870.
47 Am. Jur. Salvage, Sec. 31, pg. 280.

X.

AMOUNT OF AWARD FOR SALVAGE SERVICES

The question of the amount of the salvage award is always a difficult one. It is largely a matter of fact and discretion which cannot be reduced to precise rules, but depends upon a consideration of all the circumstances of each case. No rule of law can be laid down that a certain percentage of the property saved should go as salvage in every case; generally, when a proportion of the thing saved has been awarded, a half has been the maximum, and an eighth the minimum. Below that it is usual to adjudge a specified sum or amount of money.

47 Am. Jur., Salvage, Sec. 32, pg. 280.

XI.

APPORTIONMENT

The salvage awarded is apportioned among the owners, the master, and the crew, the owners of the ship recovering a substantial portion, usually from one fourth to one half of the entire amount, in order to encourage them to permit their master to render such services. To the master should be allotted from one-eighth to one third, for the master is a person who ought to be generally encouraged because upon him rests the whole responsibility of employing the ship. The balance should be awarded to the crew of the salv-

ing ship.

47 Am. Jur., Salvage, Sec. 38, pg. 285.

STATEMENT OF FACTS

The Oil Screw or Vessel "MELODY" and its equipment and cargo are valued from \$25,400.00 to \$39,000.00. The Lower Court found the value less the value of the fish to be \$17,500.00. That said vessel, at about the hour of 1:00 o'clock P. M. on the 24th day of July, A. D. 1945, in the Pacific Ocean, on a fine sunny day, in a mild wind and sea, was engaged in a tuna fishing venture when suddenly and without any warning whatever was thrown on her beams end and immediately filled with water. That said vessel immediately submerged to a point where only a part of her pilot house, bait tanks, mast and a small part (about 6 square feet) of her aft deck were above water. The captain and some members of her crew fearing that the Melody would sink and they be drowned forthwith leaped into the sea. R. 221. A life raft was loosened from the Melody and all five members of the crew proceeded to board it. The raft was not made fast to the Melody, or any attempt made to do so. What happened to the crew after that or their intentions in abandoning the Melody, we have but the captain's word for it. We did not have the benefit of any testimony of any other members of the Melody's crew. The

captain stated the wind blew the life raft away from the Melody, the wind being about 5 or 6 miles per hour. Thereupon, according to the captain of the Melody, the raft was rowed towards the shore for the purpose of landing through the breakers and seeking help. In the meantime, Captain Wuori and the members of the crew aboard the Oil Screw or Vessel "Stampede II," a deep-sea fishing vessel, of the value of \$35,000.00, sighted the derelict vessel "Melody," and at about 3:00 o'clock P. M. arrived alongside the said Melody and discovered there were no persons visible aboard said vessel. The Stampede II proceeded to make two circles about the sinking Melody seeking for the crew, which libelants expected to find in life preservers, if any were found. In the meantime, Captain Wuori notified the United States Coast Guard at its station at the Port of Astoria, Oregon, of the facts and requested that immediate search be made for the Melody's crew and assistance for the purpose of attempting to save the Melody, her equipment and cargo. When no survivor could be found, libelant Armand Syvanen, a member of the crew of the Stampede II, at the risk of his life and injury to his person, R. 126-277-263-56-159-100-102 boarded the Melody and made fast a line from the Stampede II to the Melody. At this time, a government crash boat arrived on the scene with the crew of the Melody, and were requested to make fast

a line to the Melody and assist with the tow. R. 59. This request was refused, the officer in charge of the crash boat stating that the crash boat was not equipped to tow. Therefore, they were requested to place some chaffing gear on the Manila rope which was placed around the rudder stock by libellant Syvanen, and return Syvanen to the Stampede II. Thereupon, Captain Rustad of the Melody and one member of the crew of the crash boat proceeded to remove said Syvanen from the Melody to the Stampede II, but refused to place any chaffing gear on the Manila line as requested, or in any way assist with the salvaging of the Melody. That approximately at 3:00 o'clock P. M., the Melody went under tow of the Stampede II.

At approximately 6:00 o'clock P. M. of said day, a United States Coast Guard open surf boat and the 52 foot United States Coast Guard "TRIUMPH," made fast lines to the Melody and assisted in the tow, the Stampede II being in the lead about 100 or 150 feet, followed by the two Coast Guard vessels, following equal distant, and being 75 to 100 feet respectively off the port or starboard beam of the "Stampede II." When the Stampede II first started to tow and salvage the Melody, her equipment and cargo, their position was from 7 to 10 miles Northwest of the North Jetty of the Columbia River, a distance of 14 to 17 miles from the United States Coast Guard Station of

the Port of Astoria, Oregon, the place where the Melody was beached at about 1:30 o'clock A. M. on July 25, 1945, and the water removed from her holds. When the tow was started, the tide was about one-half ebb. R. 62. This was an important factor in the salvaging operation, for it was all important to get the Melody into a safe haven during the coming flood tide, R. 54, which started at 8:04 o'clock P. M. on July 24, 1945, and ended at 1:55 o'clock A. M. on July 25, 1945. Current tables Pacific Coast for 1945, published by U. S. Dep. of Commerce page 95. That on account of the bar, tide, current sets and shoals, the waters in the vicinity are historically dangerous and have claimed many vessels and hundreds of lives. R. 89-195. The tow proceeded satisfactorily until the tow reached a position in the main ships' channel off the Columbia River, which was about on a line drawn from the West ends of both the North and South Jetties of the Columbia River. This area is dangerous to vessels and crews. The tide was flooding strong when Captain Wuori, at about 11:00 o'clock P. M., whose vessel was in the lead, suggested that they shorten their lines so that better control be had of the tow since they were entering more congested waters, particularly a mine field. Thereupon, the Stampede II entered upon shortening its line and while so doing, its propeller became fouled with the tow line of the triumph. Thereupon, the

Stampede II cut loose its tow line which was lost, and cut the tow line of the triumph between it and the Stampede II, and then cut said tow line between the Stampede II and the Melody, and delivered it to the triumph, which made it fast and continued with the tow. Captain Wuori then freed the propeller, and, in the meantime, as a matter of prudence and good seamanship, requested a tow from a third Coast Guard vessel, an open surf boat, which was accompanying the tow. The Stampede II was not incapacitated, and Charles Wuori intended to resume the tow, if it became necessary, which later investigation showed could have been done efficiently and without damage to the Stampede II. R. 73. Thereupon, the Stampede II and said third United States Coast Guard vessel stood by the Melody, her equipment and cargo, until all danger was passed. The next morning, Captain Wuori and the members of the crew assisted by the members of the United States Coast Guard removed the water from the Melody's hold. Thus, the Melody, her equipment and cargo, was saved, without any assistance from the members of the crew of the Melody, with the exception of Rustad's assistance in removing libellant Syvanen from the Melody after he had made fast the tow line.

ARGUMENT

Whilest, the appellants have specified 10 assignments of error, nevertheless in their brief they state in effect that these assignments are in essence, that the services performed were not salvage of a high order since they contributed little to the ultimate success, and there was little danger, either to the salvaged property or to the salvors, and considering the value of the property, \$17,500.00, the award was too high. In other words, it is their contention, as we understand it, that the court erred in making the award in the amount that it did and that such award is too high. Since this court, if it disallows the appellees motion to dismiss the appeal, will try the case de nova, ~~it~~ appears to us that the whole law of awarding salvage is brought into consideration. There are many legal propositions involved in making a salvage award. And it is our thought that it would be better for us to set forth, as we have, the points and authorities which we consider pertinent and the proper rules to follow in making an award. Therefore, we shall argue the points and authorities in the order in which they are set forth.

POINT AND AUTHORITIES No. I. to-wit, is as follows:

MOTION TO DISMISS APPEAL

Subdivision (b) of Rule 73 of the Rules of Civil Procedure governing Appeals to the Circuit Court of Appeals, definitely states that the notice of appeal shall state the name of the court to which the appeal is taken. If you will observe the petition for appeal, found on page 30 and 31 of the record, you will find that such petition does not name the court to which the appeal is taken and, likewise, the order allowing the appeal, found on pages 31 and 32 of the Record, does not name the court to which the appeal is allowed.

Thus, it would appear, since we understand the rules of the court have the same status as statutes, that appellees motion to dismiss the appeal should be allowed. The appellees filed a written motion to dismiss the appeal and notified appellants that appellees would call the motion up for argument at the time the argument is made on the appeal.

POINT AND AUTHORITIES No. II.

FRIVOLOUS APPEAL

An appellate court in reviewing the amount of a salvage award, the fixing of which involves the exercise of discretion by the lower court, is always reluctant to make any alteration thereof; it will not interfere with the decision of the court below as to the amount of salvage awarded unless the judgment has proceeded upon an erroneous principle or a misap-

prehension of the facts, or is grossly or manifestly excessive or inadequate. The fact that the appellate court might have allowed a greater or less sum if the question had first been presented to that court is no ground for increasing or reducing the award. In accordance with these principles, the award fixed upon by the lower court will not be increased on the ground that it is inadequate. The same rule is applicable in diminishing the amount fixed upon by the lower court, and the amount so fixed will not ordinarily be diminished unless it can be said to be excessive as a matter of law.

47 Am. Jur., Salvage, Sec. 46, pg. 289.

We observe, according to the above rule, that the appellant court is always reluctant to make any alteration in the award and will not interfere with the amount of salvage awarded, unless the judgment has proceeded upon an erroneous principle or misapprehension of fact, or is grossly or manifestly excessive or inadequate. Since it is always a difficult problem to arrive at a proper award, and so recognized by the admiralty law, the fact that the appellate court may have allowed a greater or less sum if the case was first presented to it is no ground for increasing or reducing the award.

It appears from appellants' argument that they are peeved and dissatisfied with the amount awarded ap-

pellees in the lower court and they simply disagree with Judge McColloch's determination of the facts. There is no contention made by the appellants that the lower court was in error upon the law. They simply cite cases wherein, in those particular cases, a lower award was granted. But those cases were not based upon similar facts to those in this case. There was ample evidence to justify all of the findings of fact and, thus, it is our contention that no error can be demonstrated in this respect for none occurred.

The testimony of the witness for the appellees was to the effect that they thought the vessel "Melody" was sinking, likewise Coast Guardsman Gaither so thought, R. 331, and they were apprehensive of getting the vessel into Astoria during the coming flood tide. In this respect we call the court's attention to a misprint in the record where Charles Wuori was reported to have stated: R. 53

"* * * so we were able to get that in on the next **flat** tide in the Columbia."

The use of the word "**flat**" was a misinterpretation by the reporter. Obviously the word was "**flood**." Mr. Wuori is Finnish and speaks with a Finnish brogue and is at times difficult to understand.

This court takes judicial knowledge of the tides and currents of the Columbia River and the general dangerous

conditions of the Columbia River in the vicinity of Peacock Spit. This is common knowledge and history. It is a matter of common knowledge that many vessels and lives have been lost in this vicinity.

We have cited Current Tables, Pacific Coast, North America and Philippine Islands, for the year 1945, published by U. S. Department of Commerce, Coast and Geodetic Survey. At page 95 thereof, referring to that, we find that the average flood tide at Cape Disappointment Light, 1 3-8 miles S. 25° E. of Cape Disappointment Light is 2.6 knots and at the same location the average ebb tide is 4.3 knots and $\frac{1}{2}$ mile of northeast of Clatsop Spit the average velocity of the flood tide is 1.8 knots and the ebb tide 3.5 knots.

It takes no mathematician to figure that had the tow not been undertaken at the time appellees did start the tow, and the tow was not started until the arrival of the Coast Guard vessels, which would have been over 2 hours later at the point of the commencement of the tow, to definitely determine that the tow would not have been completed on the flood tide, and, likewise, it takes no mathematician to take into consideration the length of the time it took to make the tow, to definitely determine that all 3 vessels engaged in the tow could not have handled it against a 3.5 to 4.3 knot ebb tide—simply a physical impossibility.

Whether the vessel "Melody" would have remained afloat during the intervening period before the next flood tide is a question that this court and no one else will ever know. We have not cited a lot of cases showing salvage awards for the simple reason that it is our view of the law that each case is decided on its own merits upon the rules of law, which we have set forth in our points and authorities.

Appellants criticized the finding that Mr. Wuori did not explain satisfactorily why he lost one and one-half fishing trips. We call your attention to R. page 124 and 125 the matter is here explained.

It appears to us that this is a frivolous appeal. Appellants, of course, had knowledge of the point and authority we are here discussing. They have not pointed out where the court was in error in any principle of law or established any lack of proof of any finding. Its appeal looks to us to be a wild fishing expedition. It seems that, if this court sustains the lower court, which to us it appears it cannot do otherwise, damages should be awarded for a frivolous appeal.

POINTS AND AUTHORITIES No. III.

GOVERNMENT ASSISTANCE

Where a government vessel and others co-operate in a salvage service, the proper method of making an award to the latter is to fix the value of the entire service and deduct the share earned by the government ship.

Central Wharf Towboat Co., et al. v. United States, (The Anahuag), 295 Fed. 246.

United States v. Central Wharf Towboat Co., 3 Fed. (2d), 250.

47 Am. Jur., Salvage, Sec. 26, pg. 277.

The two cases cited are salvage cases wherein the United States Coast Guard vessels assisted in the salvage and both cases announced the legal doctrine that the proper procedure is to determine the total value of the salvage service and then deduct therefrom the value of services rendered by the government and award the balance to libelants. The law in this respect is clear.

POINTS AND AUTHORITIES No. IV.

RULES OF SALVAGE AWARD

Courts of admiralty usually consider the following circumstances as the main ingredients in determining the amount of the reward to be decreed for a salvage service: (1) The labor expended by the salvors in rendering the salvage service. (2) The promptitude, skill and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4) The risk incurred by the salvors in securing the property from the impending peril. (5) The value of the property saved. (6) The degree of danger from which the property was rescued.

The Ship Blackwall, her tackle, etc., James Creary, claimant, vs. The Sancelito Water and Steam Tug Company, and George Clark, 19 L. ed., pp. 870-875.

47 Am. Jur., Salvage, Sec. 33, pg. 281.

47 Am. Jur., Salvage, Sec. 6, pg. 265.

The United States Supreme Court, in the case of *The Ship Blackwall*, her tackle, etc., *James Creary, Claimant, vs. The Sancelito Water and Steam Tug Company and George Clark*, 19 L. ed., pp. 870-875, held that Courts of Admiralty usually consider six circumstances as the main ingredients in determining the amount of the award to be decreed for a salvage service. We will discuss them in the order set forth by the Supreme Court.

FIRST: THE LABOR EXPENDED BY SALVORS IN RENDERING THE SALVAGE SERVICE.

The salvage services began about 3:00 o'clock in the afternoon and terminated at about 1:30 o'clock in the morning of the next day, and about four (4) hours more were expended by Captain Wuori and his crew and the United States Coast Guard in removing water from the *Melody's* holds. All labor was done and performed necessary to conclude a complete salvage of the *Melody*, her equipment and cargo of tuna fish.

We cannot see how we can assist the Court in discussing these facts. The Court has read the testimony on what was done in the way of labor. The main thing, as we understand it, is that all labor was performed that was necessary to a full and complete salvage of the *Melody*, her equipment and cargo.

SECOND: THE PROMPTITUDE, SKILL AND ENERGY DISPLAYED IN RENDERING THE SERVICE AND SAVING THE PROPERTY.

There is no question but that Captain Wuori and the crew of the Stampede II acted quickly. First, upon observing the Melody, they forthwith proceeded alongside her and looked for her crew, and upon observing that there were no crew aboard, the Stampede II was navigated in circles around the Melody, seeking for the Melody's crew, and Captain Wuori notified the United States Coast Guard at its station at the Port of Astoria, Oregon, of the facts, and requested they make an immediate search for the crew, as well as send assistance to the Stampede II to attempt to save the Melody, her equipment and cargo. In the meantime, the crew of the Stampede II came to the conclusion when none of the members of the crew of the Melody could be found that some accident like an explosion had taken place within the Melody and that the crew were trapped inside. Thereupon, a line was made fast from the Stampede II to the rudder stock of the Melody, and the tow started and headed on a course that was hoped would timely put the tow in position to enter the Columbia River during the flood tide. It was a race in this respect, but the race was won and the Melody, her equipment and cargo, saved. No one can question that the making fast of a tow line to the

Melody's rudder stock was skillful. The Coast Guard preferred to chop a hole through the deck for this purpose rather than to proceed as did libelant Syvanen. Of course, speed at this time was not quite so essential, for the Melody was under tow and under way. When Syvanen performed the task, all members of the crew of the Stampede II thought that the Melody would sink most any time. It has not been suggested that Wuori and his crew did not act promptly and with skill and energy in engaging in the salvaging undertaking. On the contrary, he is accused of wanting to save the property and make a salvage case. It is a glaring fact in this case that neither Captain Rustad nor any member of the crew of the Melody, or any member of the Coast Guard, ever at any time during the entire salvage operations made any verbal objection to anything that Captain Wuori or any member of his crew were doing, or failed to do. This is conclusive that the salvage was undertaken with promptness, skill and energy. There is one fact that we shall never know and that is, whether or not the Melody would have sunk and become a total loss if the tow had not been started when it was started and end in a complete success when it did end. We have the testimony of the crew of the Stampede II that they feared it would sink at any time. Captain Rustad and some of his crew were of that opinion when they jumped into

the sea from fear that they would come to their death with the sinking Melody.

THIRD: THE VALUE OF THE PROPERTY EMPLOYED BY THE SALVORS IN RENDERING THE SERVICE, AND THE DANGER TO WHICH SUCH PROPERTY WAS EXPOSED.

If we apply the rule suggested by the Insurance Company's adjuster, as we recall it, the value of the two Coast Guard boats would be in the neighborhood of \$40,000.00. Mr. Wuori does not agree with this rule. He contends that the Stampede II was worth \$35,000.00 at the time of the salvage operations, and he bases this on two propositions: First, he knows the value of fishing vessels of the type of the "Stampede II." He has fished for 35 years, and during all of this time, he has owned deep-sea craft. Second, he was offered \$35,000.00 for the Stampede II a short time ago. The value that Mr. Wuori placed on the Stampede II was not questioned.

The dangerous incident to the salvage operations were enumerated by Mr. Wuori and his crew. All admit there was real danger in the work performed by Mr. Syvanen. There was danger when approaching the Melody that the wheel of the Stampede II would be fouled on nets and lines attached to the Melody. If such should happen and the Melody sink before said

lines could be released from the propeller, the Stampede II might be caused to sink and become a total loss or seriously damaged.

It is a matter of history of which the Court can take judicial knowledge that the waters on the bar at the mouth of the Columbia River and vicinity are exceedingly dangerous and have caused the loss of many ships and the lives of hundreds of men. Peacock Spit over which the current of the river prevails in a Northwest direction is ever ready to take into its folds the vessel momentarily disabled. The tow had to pass at night within a short distance of these and other dangerous waters. It takes no imagination to conclude that three vessels engaged in towing a waterlogged vessel in the night time over this part of the Columbia River is dangerous to said towing vessels and their respective crews. Another danger was the mine field. After passing the Peacock Spit area a short distance, the mine field presents a hazard, to the tow and salvaging vessels and their respective crews. To prepare to navigate this area, Captain Wuori suggested to shorten the tow line, and whilst shortening his tow line, the propeller of his vessel became fouled with the tow line of the Triumph. It is not entirely clear just what caused this. It all happened, according to the officer in charge of the United States Coast Guard vessel "Triumph," in a matter of minutes. R. 267.

The towing vessels were 50 to 100 feet abreast of each other, so it is obvious that the time was short. In any event, it demonstrates that there was actual and continuous risk and danger in making this tow. It was one of the many hazards. No one can censure Captain Wuori for being concerned over the position in which he found himself. Fortunately, the tow line of the "Triumph" was Manila and not steel. Thus, it could be more easily cut. Had it been steel, the danger would have been greater. Fortunately, by good seamanship and energy, the Stampede II was able to free the line from the propeller and go under tow of a third United States Coast Guard boat. This was a matter of caution and good seamanship under the circumstances, but not necessary, for the Stampede II was not incapacitated. R. 73.

FOURTH: THE RISK INCURRED BY THE SALVORS IN SECURING THE PROPERTY FROM THE IMPENDING PERIL.

What we have stated immediately above under the **THIRD** circumstance and main ingredients in determining the amount of the award applies to this, the **FOURTH** circumstance in determining the amount of the award.

We know the waters at the mouth of the Columbia River are historically dangerous to ships and crew and

have claimed many vessels and caused the loss of many hundreds of persons. The tow through these dangerous waters was at night. Other shipping was going in and out of the river. Three vessels were engaged abreast in making the tow. It was all important that the tow be completed and the Melody beached before the tide started to ebb. This race was won by a scant approximate one-half hour, and the Melody, her equipment and cargo, saved.

By promptness and skill on behalf of the libelants and the United States Coast Guard, the dangerous incident to the tow were avoided and valuable property saved.

FIFTH: THE VALUE OF THE PROPERTY SAVED.

There is a dispute in the facts here. Captain Wuori contends that the Melody and her equipment, after the salvage was completed, was worth in the neighborhood of \$32,000.00, and the cargo is admitted by the pleadings to be of the approximate value of \$1,400.00. The Insurance adjuster values the naked cost of the Melody at \$20,000.00. The Adjuster did not take into consideration a bait tank of the approximate value of \$4,000.00, or the \$1,400.00 cargo of tuna fish. If we add these items, the value would be \$25,400.00. If we deduct the cost of repairs (Respondents' Exhibit No. 5), we have

a total valuation of the vessel, her equipment and cargo, of the sum of \$19,235.55, according to respondents' contention. The Lower Court found the value to be \$17,500. R. 27.

Regarding Respondents' Exhibit No. 5, we are far from satisfied with the cost of repairs. It is not segregated in a manner at all satisfactory. It is not dated. Sums are lumped. We were and still are perplexed why the repair man was not called. Why were we not given an opportunity to have an explanation of this bill? It is certainly an unusual procedure. Thus, we view it with suspicion.

SIXTH: THE DEGREE OF DANGER FROM WHICH THE PROPERTY WAS RESCUED.

What we have said before applies to the above circumstance as one of the main ingredients in determining the award.

To briefly recapitulate—

Three of the four libelants stated that during the time they observed the Melody before they entered upon the tow, the vessel was sinking deeper and deeper in the water and that it was their judgment that she was momentarily liable to completely sink and become a total loss. Rustad and his crew also thought the same. If not, why was no effort made to fasten a line

to the Melody from their life raft? Once the tow was undertaken, it was at all times kept under way. A waterlogged vessel kept under way is less likely to sink, for the action of the water on the bottom thereof acts as a lifting plane.

The dangerous waters in the vicinity of the mouth of the Columbia River were safely navigated, and using respondents' figures of value, a vessel and her equipment and cargo, worth \$17,500.00 as found by the Lower Court were saved.

As elsewhere pointed out in our argument, the Melody was beached shortly before high water, according to the tide table, which is an exhibit in this case. It is obvious that had not the Stampede II promptly undertaken the tow when she did—some 2½ hours before assistance arrived—the Melody could not have been salvaged on the coming flood or incoming tide, commencing at 8:04 P. M., Pacific War Time, but would have had to await the next flood tide beginning at 8:50 A. M. Pacific War Time the next day. Who is there to say that the Melody could have been kept afloat these additional 12 hours.

POINTS AND AUTHORITIES No. V.

EFFECT OF ASSISTANCE

If part of a salvage service is performed by one set of salvors, and the salvage is afterward com-

pleted by others, the first set is entitled to a reward pro tanto for the services they actually rendered even though the part they took, standing by itself, would not in fact have effected the salvage. 47 Am. Jur., Salvage, Sec. 26, pg. 277.

We cannot see how we can hope to assist the Court in arguing this legal doctrine in connection with the facts. The doctrine is so clear and well settled that it does not seem possible that the minds of lawyers could differ on its meaning or on its proper application to the facts in the case at bar.

POINTS AND AUTHORITIES No. VI and No. VII.

IV.

DERELICT

Derelict vessels and other property constitute subjects of salvage. A vessel or cargo is derelict within the rules of the maritime law relating to salvage when it is abandoned without hope of recovery and without intention of returning to it. It is immaterial whether the abandonment arises from accident, necessity, or voluntary dereliction.

47 Am. Jur., Salvage, Sec. 4, pg. 263.

V.

QUASI DERELICT

In salvage proceedings where the circumstances do not constitute the vessel in question a derelict, but are of such a nature as to render the services performed in saving it highly meritorious, the courts have sometimes applied the term "quasi derelict" to the vessel. Thus, the term has been

applied to a vessel in a desperate condition, where the persons on board were incapable, by reason of their mental and physical condition, of doing anything for their own safety. So, also, it has been held applicable to a vessel left by its master and crew when thought to be sinking, where the master had gone immediately for assistance, and the vessel was finally brought to port.

47 Am. Jur., Salvage, Sec. 5, pg. 264.

We will discuss these two POINTS AND AUTHORITIES together.

The fact that the Melody, her equipment and cargo, was a derelict or quasi derelict does not in itself arbitrarily increase the amount of the award to the salvors. If she was a derelict, or quasi derelict, the Court can, in its discretion, consider that fact and decree an increase in the amount of the award that it would decree, if such fact were not present.

Was the Melody, her equipment and cargo, a derelict? There is no question but that the entire crew abandoned the ship. They never made any attempt to make fast a line from their life raft to the Melody. After all says Rustad, the owner, he was insured to the full value of the Melody. Abandonment is rather a question of intention. The above fact would seem to prove an abandonment.

It is most strange and unusual, as we have remarked before, that out of a crew of five, only Captain Rustad

appeared as a witness at the trial; nor was their absence accounted for, or was any attempt made to account for their absence. Since these four stalwart fishermen did not appear, or their absence explained, we can do naught else than assume that their testimony would have been that it was their intention to abandon the ship and get safely to shore. Thus, the ship was a derelict when the tow line was made fast from the Stampede II to the Melody. Did not Captain Rustad say he thought that Captain Wuori was attempting to make a salvage claim when he and his crew arrived at the scene safely aboard the crash boat? Did he or any member of his crew make any verbal objection, or voluntarily offer any assistance or advice to the Stampede II or her crew? No, they did not. The only thing they did was to **refuse** to apply chaffing gear to the Manila line attached to the rudder stock of the Melody, as requested by Captain Wuori. Everything points to the fact that the Melody was a derelict.

POINTS AND AUTHORITIES No. VIII.

INJURY TO SALVING VESSEL

It is settled that a salvage award should include damages suffered by the salving vessel due to the necessities of the service.

47 Am. Jur., Salvage, Sec. 36, pg. 283.

Since this doctrine is so clear and well settled, we feel that we cannot aid the Court any at this time by

arguing the same.

POINTS AND AUTHORITIES No. IX, No. X, and No. XI.

IX.

THE AWARD FOR SALVAGE SERVICES

Salvage is not viewed by the admiralty courts merely as pay on the principle of a quantum meruit, but as a reward given for perilous services voluntarily rendered, and as an inducement to seaman and others to embark in such undertakings to save life and property.

The Blackwall v. Sancelito Water & Steam Tug Co., (The Blackwall), 10 Wall 1, 19 L. ed. 870.
47 Am. Jur., Salvage, Sec. 31, pg. 280.

X.

AMOUNT OF AWARD FOR SALVAGE SERVICES

The question of the amount of the salvage award is always a difficult one. It is largely a matter of fact and discretion which cannot be reduced to precise rules, but depends upon a consideration of all the circumstances of each case. No rule of law can be laid down that a certain percentage of the property saved should go as salvage in every case; generally, when a proportion of the thing saved has been awarded, a half has been the maximum, and an eighth the minimum. Below that it is usual to adjudge a specified sum or amount of money.

47 Am. Jur., Salvage, Sec. 32, pg. 280.

XI.

APPORTIONMENT

The salvage awarded is apportioned among the owners, the master, and the crew, the owners of

the ship recovering a substantial portion, usually from one fourth to one half of the entire amount, in order to encourage them to permit their master to render such services. To the master should be allotted from one-eighth to one-third, for the master is a person who ought to be generally encouraged because upon him rests the whole responsibility of employing the ship. The balance should be awarded to the crew of the salving ship.

47 Am. Jur., Salvage, Sec. 38, pg. 285.

Since these are all allied, we shall discuss them together.

Discussing POINTS AND AUTHORITIES No. IX. and No. X. aforesaid—

It is well settled, and has been for many, many years, that the amount of the award should be ample and liberal to induce others to engage in such service. The amount lies wholly within the discretion of the Court. The only evidence offered on this subject was given by Captain Wuori, whose judgment was, that an award be decreed to the Stampede II and her crew in an amount equal to one-third of the value of the Melody, her equipment and cargo, at the termination of the salvage, plus the costs of the tow line lost, oil, and radio telephone calls, which, as we recall, amounted to approximately \$300.00. R. 199. This to us seems fair, taking into consideration the service performed, the risks incurred, and the result accomplished, and, further, taking into consideration the fact that the Stam-

pede II and its crew lost a trip and a half of fishing, which would have netted between \$4,000.00 and \$5,000.00, R. 198-125, all without the hazards that accompanied the salvage operations.

Discussing POINTS AND AUTHORITIES No. XI.

We have set forth under this heading the general rule on the apportionment of the award. The rule seems to be well settled. We only desire to discuss one feature involved in this doctrine.

We feel that a special award should be decreed to libellant Syvanen. Without arguing at length his contribution to the success of the salvage, it is admitted by all that he risked his life and limb in making fast the Manila line to the rudder stock of the Melody. Without a line made fast to the Melody, the salvage could not be made. There was real danger of the Melody suddenly sinking. There was danger that if this happened, he might be entangled in the ropes and fish hook in the cockpit and carried to his death or seriously injured. There was danger of serious injury by a sudden tossing of the Melody such as caused her capsizing, as related by Captain Rustad. These facts and others set forth in the record, in our opinion, justified the lower Court in making a special award to libellant Syvanen.

IN CONCLUSION, we call the Court's attention that we have repeatedly cited Volume 47, American Jurisprudence. Our reason for this is, that the treatise on the law of salvage found in this volume is of recent date. It is copyrighted in 1943. In checking the authorities, it appeared to us that this treatise is well edited and accurate and contained the late law. The treatise is clear and concise and sets forth about all that can be said on the law of salvage on the points involved herein.

We trust that our efforts herein have been of some assistance to the Court and lessened its labors and that the decree of the Lower Court be sustained.

Respectfully submitted,

JAY BOWERMAN,

A. C. FULTON,

Attorneys for Libelants.